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Filed

Office of the Clerk

SUPREME COURT
231 E. State Capitol
P.O. Box 1688
Madison, Wisconsin 53701-1688

Telephone 608-266-1880

To: November 16, 1994

Hon. Philip M. Kirk
Waupaca County Cir. Ct.
811 Harding Street
Waupaca, WI 54981-2087

David J. Becker
Asst.Atty.General
P.O. Box 7857
Madison, WI 53707-7857

Glenn L. Cushing
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Gary J. Schuster
District Attorney
421 Nebraska St.
Sturgeon Bay, WI 54235-0670

You are hereby notified that the Court has entered the following order:

No. 94-0415-CR State v. McBride L.C. #91CF146

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of defendant-appellant-petitioner Challoner Morse McBride, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Abrahamson, J., dissents.

Marilyn L. Graves

Clerk of Supreme Court

Filed Sept. 7. 1994

No. 94-0415-CR IN COURT OF APPEALS

STATE OF WISCONSIN DISTRICT III

STATE OF WISCONSIN,
Plaintiff-Respondent,

v. DECISION

CHALLONER MORSE McBRIDE,
Defendant-Appellant.

APPEAL from a judgement and orders of the circuit court for Door County; PHILIP M. KIRK, Judge. Affirmed.

Before Cane, P.J., LaRocque and Myse, JJ.

MYSE,J. Challoner Morse McBride appeals a judgement of conviction for one count of theft by a bailee as a party to the crime in violation of § 943.20(1)(b), Stats., and three counts of theft by fraud as a party to the crime under § 943.20(1)(d), an order denying her motion for the suppression of physical evidence and an order denying her motion for postconviction relief. McBride

contends that the evidence seized pursuant to the execution of the search warrant should be suppressed because the warrant was not issued by a neutral and detached magistrate as required by the United States and Wisconsin Constitutions. McBride further contends that the trial court committed reversible error when it failed to instruct the jury that the value of the items subject to the charge must be proven beyond a reasonable doubt. Because we conclude that the warrant was issued by a neutral and detached magistrate and that McBride waived her objection to the instruction involving proof of value beyond a reasonable doubt by failing to object either at the instructions conference or after the instructions were given, the judgement and the orders are affirmed.

The facts of this case are undisputed. Challoner Morse McBride, a practicing attorney in Door County, Wisconsin, was convicted of one count of being a party to

the crime of theft by a bailee under § 943(1)(b), Stats., and three counts of theft by fraud under § 943.20(1)(d). The convictions stemmed from the theft of funds from McBride's client, Eulalia I. Addison.

At the time of the conviction, Door County had a single branch of the circuit court presided over by Judge John Koehn. Thomas Fassbender, a special agent for the State Department of Justice, applied to Judge Koehn for a warrant to search McBride's law office. The warrant sought records and documents relating to alleged thefts by McBride from Eulalia I. Addison and the Eulalia I. Addison Foundation. Based upon a finding of probable cause, which is not challenged in this appeal, Judge Koehn signed the search warrant that resulted in the discovery of a series of documents and business records used to obtain the convictions of McBride.

McBride contends that Judge Koehn was

not a neutral and detached magistrate as required by the constitution because he harbored actual bias against her. McBride asserts that at the time of Judge Koehn's initial election, she was active in supporting Judge Koehn's opponent and that shortly after Judge Koehn took office she began to have problems with him. Based upon these problems, which included allegations of gender bias, McBride wrote letters to the chief judge of the eighth judicial district explaining the problems she was having with Judge Koehn. The record is silent as to any action taken by the chief judge. In addition to these letters, McBride filed a formal complaint against Judge Koehn with the Wisconsin Judicial Commission. The commission conducted an investigation and subsequently dismissed the complaint after finding that there was no probable cause to proceed further.

During the period the complaint was

pending, Judge Koehn's court reporter advised McBride that Judge Koehn intended to recuse himself from all cases in which McBride appeared as counsel. After Judge Koehn made this announcement, McBride appeared in hundreds of cases filed in Door County and Judge Koehn uniformly disqualified himself in each one of those cases. In over 150 of the judicial assignment orders submitted by Judge Koehn, he cited § 757.19(2)(g), Stats., as the basis for his disqualification. Section 757.19(2)(g) provides that a judge should disqualify himself if he "determines that, for any reason, he or she cannot or it appears that he or she cannot act in an impartial manner."

The State and McBride agree that the constitution requires that "inferences of probable cause be drawn by 'a neutral and detached magistrate'" before a search warrant may issue. Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972); see also State v.

DeSmidt, 155 Wis.2d 119, 131, 454 N.W.2d 780, 785 (1990) ("A search warrant may only issue on the basis of a finding of probable cause by a 'neutral and detached magistrate.'") If the issuing magistrate does not meet this constitutional mandate, the warrant is invalid. See Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971).

McBride contends that Judge Koehn was not a neutral and detached magistrate. In support of her contention, McBride cites three United States Supreme Court cases where the Court invalidated a search warrant on the ground that the issuing magistrate was not neutral and detached. A review of these three cases reveals that they are not dispositive of McBride's contention that Judge Koehn was not neutral and detached. In Coolidge, the Court held that the issuing magistrate was not neutral and detached because he was also the chief investigator and prosecutor on the case. Id. In Connally

v. Georgia, 429 U.S. 245, 246 (1977), the Court invalidated a search warrant on the ground that the justice of the peace was not neutral and detached because he received compensation for each warrant he issued. Finally, in Lo-Ji Sales Inc. v. New York, 442 U.S. 319, 326-27 (1979), the Court held that the issuing magistrate was not neutral and detached after he participated in the execution of the warrant. McBride's claim is wholly distinct from the claims made in Coolidge, Connally and Lo-Ji Sales.

McBride contends that Judge Koehn was not a neutral and detached magistrate because he harbored actual bias against her. This court has been unable to find a case that has dealt with this issue, and neither the State nor McBride has cited such a case. However, because McBride's claim centers on the question of whether Judge Koehn was impartial, we find those cases dealing with a defendant's constitutional right to an

impartial and unbiased judge to be instructive.

Whether Judge Koehn was a neutral and detached magistrate as mandated by the United States and Wisconsin Constitutions is a question of constitutional fact that we review de novo without deference to the trial court. State v. Ledger, 175 Wis.2d 116, 122, 499 N.W.2d 198, 200-01 (Ct. App. 1993). Furthermore, we note there is a presumption that a judge is free of bias and prejudice. See Ex Parte Twintech Indus., Inc., 558 So.2d 923, 926 (Ala. 1990); State v. Rossi, 741 P.2d 1223, 1225 (Ariz. 1987); Korolko v. Korolko, 803 S.W.2d 948, 950 (Ark. Ct. App. 1991). To overcome this presumption, the party asserting judicial bias must show that the judge is biased or prejudiced by a preponderance of the evidence.[1] See Rossi, 741 P.2d at 1225. With

[1] The parties have not cited, nor has this court found, Wisconsin precedent that creates a presumption of judicial impartiality or establishes the burden of proof a party

this in mind, we now turn to the question of whether Judge Koehn was a neutral and detached magistrate.

In determining whether Judge Koehn was actually biased, we must evaluate the existence of bias in both a subjective and an objective light. See State v. Rochelt, 165 Wis.2d 373, 378-79, 477 N.W.2d 659, 661 (Ct. App. 1991). The subjective component is based on the judge's own determination of whether he will be able to act impartially. Id. In determining whether the subjective test is satisfied, it is only necessary to examine Judge Koehn's actions concerning the application for the search warrant. If Judge Koehn subjectively believed he would not be able to act impartially, he would have been

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must meet to prove judicial bias. Because we find it persuasive, we adopt the presumption of judicial impartiality used in other jurisdictions and conclude that a party must prove judicial bias by a preponderance of the evidence in order to overcome this presumption.

required to disqualify himself from hearing the application for the search warrant. Because he did not disqualify himself, we may presume that Judge Koehn believed himself capable of acting in an impartial manner and therefore, our inquiry into the subjective test is at an end. See id. However, the fact that Judge Koehn did not believe that he was subjectively biased does not end our inquiry.

Under the objective test, we must determine whether there any objective facts demonstrating that Judge Koehn was actually biased. See id. Under this test, the defendant must show that the "trial judge in fact treated him unfairly."[2] Id. Merely showing that there was an appearance of partiality or that the circumstances might

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[2] For example, in Connally v. Georgia, 429 U.S. 245 (1977), the United States Supreme Court determined that a justice of the peace was not impartial where he received compensation for each warrant that he issued.

lead one to speculate that the judge was partial is not sufficient. State v. Hollingsworth, 160 Wis.2d 883, 894, 467 N.W.2d 555, 560 (Ct. App. 1991).

Here McBride first contends that Judge Koehn's voluntary recusal in a large number of cases in which McBride appeared as attorney is proof of his prejudice. We do not agree. In the vast majority of cases in which Judge Koehn disqualified himself, he cited §757.19(2)(g), Stats., as the basis for disqualification. Under § 757.19(2)g), a judge must disqualify himself if he determines that he cannot act in an impartial manner or if there is an appearance that he is not impartial. Because Judge Koehn was required to disqualify himself if there would be the appearance of bias is not a sufficient basis upon which to make the constitutional challenge mounted here. See Hollingsworth, 160 Wis.2d at 894, 467 N.W.2d at 560. Therefore, in order for McBride's claim to

succeed, she must demonstrate that Judge Koehn was actually biased against her. We conclude that the evidence submitted by McBride is insufficient to show that Judge Koehn was actually biased against her.

While the record provides an ample basis for the judge's conclusion that there would be the appearance of partiality, it does not demonstrate that Judge Koehn was actually biased. There is nothing in the record to show that Judge Koehn acted unfairly when he issued the search warrant. In fact, the record shows quite the opposite. Prior to issuing the search warrant Judge Koehn made an inquiry into the scope of the warrant because he was concerned about the attorney-client privilege. The concern expressed by Judge Koehn before issuing the warrant demonstrates that he maintained the neutrality and impartiality his position demands. Furthermore, because McBride does not claim that Judge Koehn issued the

warrant without probable cause, there is no reason to believe he acted improperly or unfairly. Therefore, we conclude that Judge Koehn's decision to disqualify himself from cases involving McBride is not sufficient evidence of actual prejudice to conclude that Judge Koehn was not neutral and detached.

McBride next contends that Judge Koehn was biased against her because she supported his opponent in the election and because she lodged complaints against him for gender bias on two separate occasions. As to McBride's support of Judge Koehn's opponent, we note that in states using elections for their judicial selection process the bar will frequently be divided among the various contenders for the judicial position. If those who support the losing candidate are allowed to claim actual bias, a judge would be unnecessarily precluded from hearing a significant number of cases arising within his or her jurisdiction. Furthermore, judges

have an ethical obligation to treat attorneys impartially. SCR 60.01(3) (West 1990). This court is unwilling to conclude that Judge Koehn violated this ethical obligation solely because McBride did not support his candidacy. Therefore, we conclude that McBride's support of Judge Koehn's opponent, standing alone, is not sufficient evidence to allow this court to conclude that Judge Koehn harbored actual bias against her.

The two complaints lodged by McBride are also insufficient evidence of actual bias on the part of Judge Koehn. As other jurisdictions have held, the mere fact that a party files a complaint against a judge is not sufficient to establish judicial bias. See In re Winslow, 107 B.R. 752, 753-54 (D. Colo. 1989); Thomas v State, 611 So.2d 416, 419 (Ala. Crim. App. 1992); Moody v. Corsentino, 843 P.2d 1355, 1374 (Colo. 1993); In re Marriage of Mann, 655 P.2d 814, 818 (Colo. 1982); see also In re Disciplinary

Proceedings Against Crosetto, 160 Wis.2d 581, 583-84 (466 N.W.2d 879, 880 (1991) (Recusal of supreme court justices from attorney disciplinary proceeding was not necessary despite the fact that the judges had previously been defendants in an unrelated action brought by the attorney.). Furthermore, neither the letter to the chief judge of the eighth judicial district nor the complaint filed with the Wisconsin Judicial Commission resulted in any discernable consequence for Judge Koehn that would give rise to an inference of judicial bias. Finally, the fact that Judge Koehn was not exposed to public scrutiny as a result of McBride's private complaints leads us to conclude that McBride's complaints, standing alone, are insufficient to demonstrate that Judge Koehn harbored actual bias against her.

In addition to examining each claim purporting to demonstrate bias individually, we must also examine the totality of the

circumstances to determine whether the cumulative effect of the evidence is sufficient to establish McBride's claim that Judge Koehn was actually biased. We conclude that it does not. The circumstances of this case demonstrate at best McBride's concern that Judge Koehn would not treat her fairly. However, McBride failed to introduce any evidence showing that Judge Koehn did in fact treat her unfairly. In fact, the evidence shows that Judge Koehn's review of the warrant was dispassionate and evinced a legitimate concern for the propriety of the requested warrant. McBride's concern over Judge Koehn's impartiality is based solely on her conduct toward him. This is not sufficient to meet her burden of proving bias. Therefore, because McBride has failed to demonstrate by a preponderance of the evidence that Judge Koehn was biased against her, we conclude that McBride's challenge to the search warrant must fail. . . . [There

follows a decision on another issue not material to the present Petition to the United States Supreme Court.]

The judgment and orders are therefore affirmed.

By the Court.--Judgment and orders affirmed.

Recommended for publication in the official reports.

FILED DECEMBER 15, 1992
STATE OF WISCONSIN DOOR COUNTY
CIRCUIT COURT

STATE OF WISCONSIN,
Plaintiff,

DECISION

vs.

Case No. 91-CF-146

J. RONALD McBRIDE and
CHALLONER MORSE McBRIDE,
Defendants.

A search warrant was executed on June 4, 1991, at Attorney Challoner Morse McBride's law office. As a result, both she and her husband, J. Ronald McBride, have been charged with various felonies concerning the improper use of client's funds. Mr. McBride, although not a lawyer, worked in the McBride Law Office as well as in a separate business, Absolute Title & Abstract. These two businesses share the same space at 306 S. Third Avenue in Sturgeon Bay.

Because the execution of the search warrant yielded potentially incriminating

evidence against each defendant, both filed companion suppression motions. An evidentiary hearing took place August 26, 1992. Defendants allege three separate grounds for suppression: 1) Door County Circuit Judge John D. Koehn was not a neutral and detached magistrate when he issued the search warrant; 2) the search conducted by law enforcement officials exceeded the scope of the search warrant; and 3) the search warrant was invalid because law enforcement officials effectively searched the premises prior to obtaining the warrant with help of defendant's employees.

Judge Koehn was elected in 1988, and Attorney McBride practiced regularly in front of him until October 1989 when Judge Koehn's court reporter called Attorney McBride and told her that Judge Koehn would recuse himself from all her cases.

This practice continued up to and after the execution of the search warrant, and still exists.

Testimony at the hearing revealed that Attorney McBride supported an opposing candidate in the judicial election that Judge Koehn won. However, within two months of Judge Koehn's taking office (August 1, 1988), Attorney McBride wrote a letter to the Eighth Judicial District Chief Judge, Harold Froehlich, concerning problems that Attorney McBride perceived with Judge Koehn. She wrote a second letter to Judge Froehlich in January 1989 reaffirming her complaints (Her complaints allege unfair treatment of herself and her clients.) Apparently, because of her belief that her perceived problems with Judge Koehn had exacerbated, Attorney McBride filed a complaint with the Wisconsin Judicial Commission on August 31, 1989. This complaint was dismissed in December 1989. It was during the pendency

of this complaint that Judge Koehn, through his court reporter, informed Attorney McBride that he would recuse himself in all of her cases. The authorization of this search warrant is the only time since the pattern of recusal began that Judge Koehn has not recused himself in a legal matter when Attorney McBride was involved.

Defendants contend that Judge Koehn's deviation from his standard practice of recusal demonstrated that he was not a "neutral and detached" magistrate for Fourth Amendment constitutional purposes. While not specifically enunciated, defendants imply this is some sort of nefarious judicial animus and retaliation for reporting Judge Koehn to the Judicial

Commission.[1]

The record at the suppression hearing showed that Judge Koehn had absolutely no knowledge of the investigation of defendants until the search warrant application was made. Therefore, defendants are left to claim that Judge Koehn's purported lack of neutrality and detachment rests upon their subjective belief that his issuance of this search warrant was such a significant deviation from his pattern of recusal to constitute a Fourth Amendment violation. While I agree with the defendants that there is no bright line test for neutrality and detachment, there is a line of demarcation sufficiently clear to separate sunny and dark sides of this constitutional prerequisite. I believe Judge Koehn's

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[1] There is no history of any professional adversary relationship between Judge Koehn and Ronald McBride. Ronald McBride is simply riding the coattails of his wife. Therefore, Ronald McBride has no independent neutrality argument.

execution of this search warrant was accomplished in the broad daylight of high noon.

Defendant's contend that § 757.19(g), Stats., the statute that Judge Koehn relied upon for his recusal, is an objective affirmation by Judge Koehn that he cannot be fair and impartial when Attorney McBride is involved in a case. This statute requires a judge to make subjective evaluation of his or her ability to impartially preside in 'any civil or criminal action or proceeding." A search warrant, or more importantly, the application for one, is not a civil or criminal action or proceeding. A search warrant is a judicially authorized investigation of purported criminal activity. A search warrant (or its application) is not an adversary proceeding. Sec. 757.19(2)(g), Stats., is

statutory direction intended to provide guidance to judges considering recusal in adversary cases. State v. American TV & Appliance, 151 Wis.2d 175. What is dispositive of this motion is whether there was any constitutional due process violation, not any statutory violation. Therefore, a constitutional inquiry into the neutrality requirement of the Fourth Amendment may not always be synonymous with an inquiry into a judge's statutory recusal decision in an adversary context. I say this being mindful that due process requires a fair and neutral magistrate in all legal proceedings.

I am convinced defendants believe that Judge Koehn's recusals are objective evidence of his bias against them because Attorney McBride reported him to the Judicial Commission. But their beliefs are only their subjective opinions based upon Judge Koehn's actions. His recusals can

reasonably be construed as his reaction to what he genuinely perceived was an unfounded, bad faith action taken by Attorney McBride. However, no academic discussion such as which came first, the chicken or the egg, is necessary. There is no evidence to find that Judge Koehn was not neutral and detached when he issued the search warrant.

Acceptance of defendants' position would require a pejorative view of a judge's role when issuing a search warrant. This perspective holds that judge is simply an extension of law enforcement, and not a buffer between coercive police activity and a citizen's right to privacy. Notwithstanding the professional estrangement between Attorney McBride and Judge Koehn, Judge Koehn performed his constitutional duty to be neutral and detached when he issued the

search warrant for incriminating evidence at Attorney McBride's office. The record of the warrant application even showed that Judge Koehn, sua sponte, raised a question about the warrant searching for client records in Attorney McBride's office, based upon his concern about attorney-client privilege. (Page 26-28, June 3, 1991 transcript.) No evidentiary extrapolation supports defendants' position that Judge Koehn eschewed his duty of neutrality and donned the cloak of judicial vengeance while wearing the smirk of a leering jackal.

State v. Walberg, 109 Wis.2d 96, 107 provides a modicum of direction about a negative relationship between a lawyer and a judge. "A mere showing of antagonism or of a strained relationship between counsel and the court is not sufficient to require disqualification. The judicial bias toward the attorney must be sufficiently severe as to reasonably call into question the court's

impartiality toward the litigant." The factual problem between Walberg and the instant case is that it evaluates judicial bias against a lawyer in terms of any impact upon the lawyer's client. Attorney McBride represents no client here. Virtually all reported cases bear this same common denominator. Albeit clumsy, if Attorney McBride was (sic) considered a litigant (not a lawyer representing a client) and one then evaluated Judge Koehn's role as the issuing magistrate, there would still be no due process violation. State v. Rochelt, 165 Wis 2d 373, 380 (quoting State v Hollingsworth, 160 Wis.2d 883, 894) held that:

> A litigant is denied due process only if the judge, in fact, treats him or her unfairly. Margoles v. Johns, 660 F.2d 291 (7th Cir 1981) [(per curiam), cert denied, 455 U.S. 909 (1982)]. A litigant is not deprived of a fundamental fairness guaranteed by the

> constitution either by the appearance of a judge's partiality or by circumstance which might lead one to speculate as to his or her partiality.

What constitutes a lack of neutrality and detachment? U.S. v. Heffington, 952 F.2d 275, 278 describes an impermissible lack of neutrality, "[I]n cases where the particular magistrate was also involved in law enforcement activities, had a pecuniary interest in the outcome of his decision, or had 'wholly abandoned' his judicial role." A violation of the neutrality doctrine requires a magistrate to have a personal stake in the outcome of a search warrant, or, at the very least, a surrender by the magistrate of his or her role as independent arbiter of probable cause.

Judge Koehn did not know anything about the investigation before application was made to him: he did not initiate any investigation of Attorney McBride; he did not profit monetarily; he did not act as a

law enforcement officer. Simply put, he acted as a neutral and detached magistrate. Defendant's subjective opinion of Judge Koehn's lack of neutrality is an attempt to evaluate a personality dispute between a lawyer and a judge to the level of an unconstitutional deprivation of due process.

Heffington[2], 952 f.2d 275, is persuasive on other grounds, too. It rejected the application of standards in various disqualification and recusal statutes in an effort to give meaning to the neutrality and detachment requirement. Heffington, 278-79. Also, the case makes an excellent point when it acknowledges that judges (police officers) in rural counties often know more about local

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[2] It also hold that the harmless error rule is applicable in this type of situation. State v. Walberg, 109 Wis.2d 96, is in accord.

citizens than their urban colleagues. The court said at Heffington, 279:

> Assuming that an appearance of partiality may lurk in the fact that judges and police officers in rural counties often know more about the local criminal recidivists do than their more urban colleagues, we are not prepared to disqualify small-town judges on demand. Here, the appearance clearly is not so 'extreme' that it constitutes a constitutional violation.

This guidance is genuinely applicable here. Judge Koehn is the only Circuit Judge in Door County, and, obviously, he is going to know many of its local citizens, especially one who is a practicing member of the local bar. Defendants' contention that Judge Koehn was not neutral and detached when he sanctioned the search warrant is predicated upon a belief that he could not be neutral after all his recusals in contested cases. Constitutional fairness for Fourth Amendment purposes does not require that Judge Koehn pretend the contentious professional history

with Attorney McBride never existed. It requires only that he not allow any ill will (if any existed) to interfere with his constitutional duty of neutrality. Defendants' subjective opinions of Judge Koehn's mental processes that caused his pattern of recusals are theirs alone. As a result, there is no objective evidentiary basis to find that Judge Koehn's issuance of the search warrant for Attorney McBride's law office was an "extreme" constitutional violation of the neutrality doctrine. Only if a magistrate's purported objectionable conduct is tantamount to a constitutional violation of due process is the neutrality doctrine violated. That did not occur here. There was no constitutional enervation of defendants' Fourth Amendment rights.

The genesis of the information that

formed the foundation of the search warrant for the McBride Law Office came from its two secretaries, Betty Rockendorf and Julie Sullivan. Betty Rockendorf believed that defendants might be stealing money from one of their clients, Eulalia I. Addison. After a cursory discussion of her fears with Julie Sullivan, Betty Rockendorf later that same day took her suspicions to he husband, Scott Rockendorf, a Sturgeon Bay policeman. Mr. Rockendorf opined that there was a possibility of criminal activity by defendants. Rather than report this to his own department, he suggested that his wife and Julie Sullivan go to an attorney for legal advice. Mr. Rockendorf did not want to report this matter to his own department because of the sensitivity associated with defendants being the potential targets. These three people then sought out Attorney Eric Stearn of Green Bay to provide legal advice.

Attorney Stearn, after initial consultation with his clients, arranged a meeting with Special Agent Robert Page and Thomas Fassbender of the Wisconsin Division of Criminal Investigation, Wisconsin Department of Justice. At this first meeting on April 17, 1991, Betty Rockendorf presented Agent Page with copies of documents she made at the McBride Law Office (See p. 109, 8-26-92 transcript for items copies.) This was the only time that she presented Agent Page with copies of documents from the law office, although she may have made copies on more than one occasion. The copies were all made by her after she first spoke to her husband about her suspicions, but before the April 17, 1991 meeting with the agents in Stearn's office. The idea to copy these documents was Betty's alone, and not her police husband's. At this

first meeting, both Betty and Julie agreed they would cooperate with the agents should any further information be needed. In response to inquiries of both secretaries, Agent Page told them the decision to continue working at the McBride Law Office was theirs alone. Only if they felt comfortable staying should either maintain employment at the law office. Julie Sullivan quit in May, 1991, and Betty Rockendorf stayed until June 4, 1991, and then quit immediately at the conclusion of the search warrant's execution. After the first meeting, the agents had two or three contacts with both secretaries, but they were perfunctory contacts.

Only after interviewing Eulalia I. Addison, the putative victim, did the agents believe there was sufficient probable cause to apply for a search warrant. They discovered that Eulalia I. Addison had given $245,000 to the McBride Law Office between

1982 and 1991.

The Sturgeon Bay Police Department took no active role in this investigation. Sergeant Arleigh Porter provided some limited support, but none was investigative. Scott Rockendorf spoke to no one in the Sturgeon Bay Police Department about this situation from the time his wife first discussed her suspicions with him, until after the search warrant's execution and its resulting public knowledge.

The execution of the search warrant yielded a massive amount of material. Substantially all of the financial records of the law office from 1982 to 1991 were seized. (See return for specific items.) Defendants challenge the warrant on several grounds.

Defendant's challenge to the warrant based upon its alleged overbreadth takes

two forms. They allege the warrant failed to recite a specific time period for documents to be seized, and that more documents were seized than authorized. These challenges could be dismissed summarily simply by citing State v. DeSmidt, 155 Wis.2d 119. Factually and legally DeSmidt is so similar that it is controlling, and only a little embellishment is needed. DeSmidt at 138 points out that lack of a time limitation in a search warrant is dependent upon the particular facts of each case. Failure to cite a time limitation is not fatal to this warrant. The agents had discovered that Addison had given the McBride Law Office $245,000 between 1982 and 1991. Certainly common sense would dictate that law enforcement was entitled to determine the commencement date of any criminal activity by defendants to enable them to determine all appropriate charges. That could only be accomplished by

review of office documents during the time period that Ms. Addison was defendant's client.

Just as the informant in DeSmidt provided information described as the "tip of the iceberg," the agents were entitled to believe the same thing about defendants' handling of Addison's legal affairs. The information provided by Betty Rockendorf and corroborated by Addison entitled the agents to draw the same common sense conclusion as drawn in DeSmidt - that is, defendant's handling of Addison's affairs was "permeated with fraud." Even though there was no allegation that the entire law practice was conducted illegally, the agents had probable cause to believe this with respect to Addison. It is important to note that defendants provided Addison with a panoply of legal services - for example:

last will and testament, income taxes, durable power of attorney, and more. As such, a complete review of defendant's records was necessary in order to develop a chronology of legal services defendants provided to Addison. Defendants seem to suggest that a search warrant can only authorize the seizure of evidence that would constitute material proof of an element of a crime that is not barred by the statute of limitations. This is not true. Because the testimony of the application hearing established an ongoing pattern of criminal behavior over the course of many years, it was not unreasonable to omit a time period in the warrant.

As correctly pointed out by Attorney Frank, it was necessary to seize law office records not directly related to dealings between Addison and the McBride Law Office. This was essential to trace what happened to all the money that Addison gave to the law

office. Establishment of the source of money and disposition of funds for each type of account is essential to determine if any fraud occurred. Agent Page's testimony at the suppression hearing (p. 243-247) explains the rational for this. Page further explained that prior to execution of the search warrant the agents had not ruled out which documents would be immaterial to this prosecution. Even though hindsight proved that a great number of items seized were not directly related to these cases, there was sufficient attenuation, albeit indirect, to seize them. Seizure of them was for the legitimate purpose of determining what happened to the money Addison gave defendants. Tracing of Addison's money by examination of the law office records affords the agents not only the ability to find out where Addison's money actually

went, but, but process of elimination, where Addison's money did not go. Because the agents had probable cause to believe defendants' conduct toward Addison was "permeated with fraud," they were justified in seizing the records they did. Even describing these generically as they did in paragraph 6 of the application and warrant was sufficient. DeSmidt, 155 Wis.2d 119, 140.

This search was not defective for overbreadth on either of the grounds alleged. Applying the proper totality of the circumstances test, the issuing magistrate was entitled to make a practical common sense determination that a warrant should issue and authorize seizure of the items sought.

Betty Rockendorf did not conduct warrantless searches of the McBride Law Office. It is absolutely clear that Betty Rockendorf made copies of law office records

before she had her first meeting with the agents on April 17, 1991. Therefore, it was impossible for her to be considered a police agent when she made those copies. It is equally clear that she made the copies on her own initiative. Even thought Betty Rockendorf made the copies after she told her policeman husband of her concerns, Betty Rockendorf did not immediately become deputized through this private husband-wife conversation. Since the Sturgeon Bay Police Department never exercised any law enforcement responsibilities, Scott Rockendorf was never in any official position to confer his law enforcement authority onto his wife.

Even after the April 17, 1991 meeting, Betty Rockendorf conducted no warrantless searches of the law office. Agent Page told both Betty and Julie to

stay employed only as long as either felt safe. It was obvious that the decision to stay at the law office was a voluntary decision that each of the secretaries could make. Neither agent asked Betty Rockendorf to make copies or remove records of the law office between April 17, 1991 and June 4, 1991. Betty and Julie's promises of cooperation were nothing more than fulfillment of a citizen's duty to cooperate with law enforcement when requested. (The record reflects that Betty Rockendorf's involvement was greater than Julie Sullivan's.) After Rockendorf's first meeting with police, the most significant information she provided to them was the layout of the office and where pertinent records could be found. It is obvious she gained this knowledge before the time she made copies of the records, as she had to know where to locate the records in order to copy them. Therefore, her knowledge of the

location of the original records was gained before any police contact; that is, prior to any colorable claim of police agency. Betty Rockendorf's altruistic motivation to report defendants' alleged criminal activity was the same rationale for her voluntary decision to stay at the law office after her report of it. It was very reasonable for her to believe that quitting would cause suspicion on the defendants' part which could lead to the disappearance of potentially incriminating evidence. Reporting suspected criminal behavior and cooperating with a police investigation are born of the same lofty virtue - citizen responsibility.

Defendants have failed to establish any government involvement in a private search. United States v. Snowadzki, 723 F.2d 1427. This case says that a private person becomes a government agent in an

illegal search and seizure if: 1) the government knew of and acquiesced in the intrusive conduct, and 2) the private party performing the search intended to assist law enforcement efforts as opposed to furthering his own needs. Betty Rockendorf's intrusive conduct of copying the McBride Law Office records occurred before the agents knew of her actions. As a result, law enforcement could not have consented to her actions.

Finally, defendants allege a warrant deficiency because it did not name Absolute Title & Abstract as one of the places to be searched. The only thing that separates McBride Law Office from Absolute Title & Abstract is each distinct business name. Absolute Title & Abstract files its own tax return and accompanying Schedule C., but for all practical purposes, the businesses are run as one.

Ronald McBride has acted as office manager of the McBride Law Office for years.

Although his client contacts are down from previous years, he still performs regular administrative duties. All files of both businesses are located in the same common area. No locked doors or closed passages separate the two businesses. The three or four secretaries for both businesses (Sherri Miller and then Joyce Bozik (sic) worked for Absolute Title & Abstract) answered phones for each business. Challoner McBride performed work for both businesses, as did Ronald McBride. (Absolute Title & Abstract sold title insurance and did abstracts.) Clients for both businesses used the same entrance. Even though both business names appear on the building at 306 S. Third Avenue, their physical separation is non-existent. Both business are jointly operated in the same common location with files and records of each open and accessible to employees of

either. To be valid the search warrant only needed to identify the physical location of records - 306 S. Third Avenue. One business name was sufficient. Even if both business names had been omitted from the warrant, that might not be fatally defective as long as the physical description of a premises to be searched is described with sufficient specificity on the warrant: an incorrect or incomplete name does not necessarily require suppression. Defendants' claim that suppression is needed for the warrant's failure to specifically name Absolute Title & Abstract is spurious.

All defendants' motions to suppress are denied. I adopt the State's position in its entirety and make it my own. Attorney Frank is directed to prepare the appropriate Order in conformance herewith.

Dated at Waupaca, Wisconsin, this 15th day of December 1992.

BY THE COURT
s/Philip M. Kirk,
Circuit Judge